(1)

Supreme Court, U.S.
FILED
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No.

In the

Supreme Court of the United States

JONATHAN PENNY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the constitutional provision barring suspension of the writ of habeas corpus was violated by the district court's dismissal of petitioner's Section 2255 petition as "untimely" and therefore outside his jurisdiction, where petitioner presented ineffective assistance of counsel issues predicated on both an allegation of an undisclosed conflict of interest as well as the quality of the representation provided, even though factual support for the latter claim was not available to petitioner until August 30, 2004, when the U.S. Attorney provided evidence that he had supplied petitioner's trial counsel with the transcript of a deposition of a key witness whose testimony went to petitioner's guilt or innocence and was relied on for enhancing sentence.

2. Whether the failure of the district court to conduct a Federal Rule of Criminal Procedure Rule 44 or *Garcia* inquiry into the joint representation issues surrounding petitioner's trial counsel required granting of the motion to vacate his judgment and conviction for a new trial due to the violation of petitioner's right to conflict-free representation.

TABLE OF CONTENTS

PAGE

Questions Presented i

Table of Contents ii

Table of Cited Authorities iv

Table of Appendices vi

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 3

Reasons for Granting the Writ 7

1. The Record Below Unequivocally Contradicts the District Court's Finding that He Did Not Have "Jurisdiction" Over Petitioner's Claims of Ineffective Assistance of Counsel. Dismissal of a Section 2255 Petition that Raises Ineffective Assistance of Counsel as "Untimely" Where Evidence of such Ineffectiveness of Counsel Is Received While the Petition Is Pending, Falls within the Exceptions to the AEDPA's Limitations Period. To Hold Otherwise Constitutes an Unconstitutional Suspension of the Writ. . . 7

2. This Court, Under Its Supervisory Powers over the Federal Courts, Should Require that the District Courts Conduct *Garcia* Inquiries into Joint Representation and Conflicts of Interest

under Federal Rule of Criminal Procedure 44, and Hold Here that the Record Requires a New Trial Because of the Lack of an Effective Waiver of Conflict-Free Counsel in Violation of the Sixth Amendment 10

Conclusion 12

TABLE OF CITED AUTHORITIES

PAGE(S)

Cases:

Apprendi v. New Jersey,
530 U.S. 466 (2000) 3

Brady v. United States,
397 U.S. 742 (1970) 10

Castillo v. United States,
531 U.S. 845 (2000) 3

Castro v. United States,
540 U.S. 375 (2003) 11

Cuyler v. Sullivan,
466 U.S. 335 (1980) 11

Glasser v. United States,
315 U.S. 60 (1942) 11

Johnson v. Zerbst,
304 U.S. 458 (1938) 10

Jones v. United States,
526 U.S. 227 (1999) 3

McCarroll v. United States,
Nos. 99 C 884, 95 CR 48-1 3

Rasul v. Bush,
542 U.S. 466 (2004) 7

Rompilla v. Beard,
125 S.Ct. 2456 (2005) 9

United States v. Fish,
34 F.3d 488 (7th Cir. 1994) 11

United States v. Garcia,
517 F.2d 272 (5th Cir. 1975) 10

United States v. Hubbard,
22 F.3d 1410 (7th Cir. 1994) 11

Statutes Cited:

21 U.S.C. § 841 (a)(1) 5

21 U.S.C. § 846 5

21 U.S.C. § 884 5

28 U.S.C. § 2253 (c) 4

28 U.S.C. § 2255 ..... 3, 4, 6, 7

United States Constitution Cited:

Article I, § 9, cl. 2 ..... 1, 7, 9

Fifth Amendment 2

Sixth Amendment 2, 7

Federal Rules of Procedure:

Fed.R.Crim.P. 11 10

Fed.R.Crim.P. 44 ..... 2, 3, 6, 8

TABLE OF APPENDICES

PAGE(S)

Order of the Seventh Circuit denying certificate of appealability decided May 3, 2005 ..... App. 1

Order of the District Court dismissing petitioner's motion for a writ of habeas corpus, entered 3/29/2005 ..... App. 2

Notice of Motion of Reconsideration, dated 11/5/2004 ..... App. 3

Motion for Reconsideration, filed 11/5/2004 ..... App. 4-10

Exhibit to Motion for Reconsideration (letter of government to petitioner's counsel) ..... App. 11-24

Order of District Court taking motion for reconsideration under advisement entered 11/18/2004 ..... App. 25-

Notice of appeal filed 11/5/2004 ..... App. 26

Order of district court denying request for certificate of appealability, entered 10/22/2004 ..... App. 27-28

Notice of Request for Certificate of Appealability dated 10/5/2004 ..... App. 29

Jonathan Penny's Request for Certificate of Appealability Pursuant to 28 U.S.C. § 2253 (c) ..... App. 30-31

Memorandum Opinion and Order dismissing Petition, filed 9/23/2004 ..... App. 32-39

Notice of Motion to Amend § 2255 Motion ... App. 40-41

Notice of Motion to Amend § 2255 Motion filed 8/8/2000 ..... App. 42-53

Motion to Vacate, Set Aside or Correction a Sentence and Supporting Memorandum of Law filed 3/22/1998 ..... App. 54-61

Petitioner Jonathan Penny respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's order denying petitioner's request for a certificate of appealability is unreported and appears at App. 1. The District Court's order denying a certificate of appealability appears at App. 27-28. The District Court's Memorandum Opinion and Order dismissing the § 2255 petition as untimely appears at App. 33-41. It may be found at 2004 U.S. Dist. LEXIS 19436 (N.D. Ill. 2004).

STATEMENT OF JURISDICTION

The judgment of the Seventh Court of Appeals was entered on May 3, 2005. App. 1. On application to a Justice of this Court, Justice Stevens, the time for filing a petition for writ of certiorari was enlarged to September 1, 2005.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS, AND RULES INVOLVED

This case involves a violation of Art. I, § 9, cl.2 of the Constitution, the right to due process of law and to counsel:

Article I, § 9, cl. 2 states:

> Clause 2. The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

The Fifth Amendment to the United States Constitution, in pertinent part, reads:

> No person shall . . . be deprived of lief, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution, in pertinent part, read:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

Rule 44 of the Federal Rules of Criminal Procedure states in pertinent part:

> Rule 44. Right to and Appointment of Counsel
>
> ((c) Inquiry Into Joint Representation.
>
> (1) Joint Representation. Joint representation occurs when:
> (A) two or more defendants have been charged jointly under Rule 8(b) or have been joined for trial under Rule 13; and
> (B) the defendants are represented by the same counsel, or counsel who are associated in law practice.
>
> (2) Court's Responsibilities in Cases of Joint Representation. The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no

conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.

STATEMENT OF THE CASE

On March 22, 1998 Jonathan Penny filed a § 2255 petition contesting whether he received effective assistance of counsel at trial and on appeal and whether the government withheld evidence requiring a *Garcia* hearing under Fed.R.Crim.P. 44. App. 54-61. On August 8, 2000, petitioner filed a *pro se* notice of motion to amend his pending petition to include claims arising under *Jones v. United States*, 526 U.S. 227 (1999), *Castillo v. United States*, 531 U.S. 845 (2000), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). On November 6, 2002, petitioner filed an Amended Memorandum in support of the pending § 2255 petition and opposing the government's contention that the petition as amended was untimely and adding authority as to areas in which trial counsel was ineffective beside the conflict of interest, including pointing out that the information which formed the operative basis of the amended petition was unavailable to petitioner until at the earliest, December of 1998 when it was discovered in another case, *McCarroll v. United States*, Nos. 99 CV 884, 95 CR 48-1. Petitioner filed his petition within one year (actually about 3 months) of obtaining the information from that case. On January 21, 2004, petitioner filed his reply to the government's response.

On April 8, 2004, the district court ordered a limited evidentiary hearing confined to the question of whether petitioner knew or should have known of the facts relating to his assertion of an undisclosed conflict of interest. The hearing took place on May 3 and May 5, 2004. At the hearing, the court conceded that it failed to follow Federal Rule of Criminal Procedure Rule 44 and did not inquire at

that time into petitioner's knowledge of the relationship between his former and present attorneys and the basis for the former's disqualification.

In response to a request by petitioner's counsel at the close of the hearing, on August 30, 2004, the government produced a letter detailing documents provided to petitioner's trial counsel, Freddrena Lyle. The letter was attached to petitioner's Motion for Reconsideration of Denial of Certificate of Appealability and Denial of Amended Petition Under 28 U.S.C. § 2255. (The Motion appears at App. 4-21 and the disclosure at App. 20 under "Enclosures".) Subsequent to the hearing, the court found that it did not have jurisdiction to consider the merits of any of petitioner's claims based solely on a determination that petitioner knew or should have known of the conflict of interest in time to file a timely § 2255 petition. App. 32-39. On October 5, 2004, petitioner moved for a certificate of appealability pursuant to 28 U.S.C. § 2253 (c). App. 29-31. On October 22, 2004, the court denied t.. request. App. 27-28. On November 5, 2004, petitioner filed a notice of appeal. App. 26. And he filed the Motion for Reconsideration noted above. The motion was denied by order dated March 29, 2005. App. 2. The Court of Appeals then "construed" the notice of appeal as an application for a certificate of appealability and denied based on a review of the "final order" of the district court. App. 1. There is no indication that the Court of Appeals reviewed the motion for reconsideration although it was attached as an exhibit to a "status report" ordered by that court which was filed on November 24, 2004. That court held that there was not a "substantial showing of the denial of a constitutional right." App.1.

However, the facts alleged were substantially affirmed by the testimony at the limited evidentiary hearing. The case against petitioner began with the filing of a civil forfeiture action. On April 4, 1989, District Judge Grady

found probable cause for a civil forfeiture action. Petitioner retained Chester Slaughter to litigate the *in rem* forfeiture. Although the probable cause affidavit named Petitioner, his wife, Clara Penny, and other family members as participating co-conspirators, Slaughter advised the Pennys that their best interests would be served by his representing Clara Penny in her capacity of president of West Side Building Corporation. A default judgment was entered against Petitioner.

A criminal indictment was filed June 9, 1992, charging petitioner with violations of 21 U.S.C. § 841 (a)(1) and 846, conspiracy with intent to distribute narcotics and distribution. The indictment charged the same information as the forfeiture case.

On September 10, 1993, petitioner was found guilty of the two charges. He had initially been represented by Slaughter during the forfeiture proceedings. Upon the government's Motion to Disqualify, Freddrena Lyle, Slaughter's partner, replaced him as counsel of record in the forfeiture cases and became counsel during the criminal proceedings as well. Petitioner was sentenced to 25 years imprisonment to be followed by Supervised Release for life. An appeal filed by Barry Spevack, Esq., was denied.

On January 10, 1991, the government moved to disqualify Slaughter. The Motion was sealed. In late October, 1998, petitioner first became aware that Slaughter had been under investigation for narcotics trafficking, during the forfeiture action.

Ms. Lyle appeared in the forfeiture on January 13, 1992. She was also retained for the criminal case. The offices of Slaughter and Associates (later Slaughter & Lyle), by filing in the name of Clara Penny, effectively foreclosed any double jeopardy claim on the part of petitioner. Despite the restriction of 21 U.S.C. § 884 precluding "the

exploitation of such testimony or other information, may be used against the witness in a criminal case," petitioner was not named as claimant. The same evidence used in the forfeiture case was duplicated in the criminal case. See App. 56-57.

At the limited evidentiary hearing, Attorney Lyle testified that she did not know that her associate/partner, Chester Slaughter, had been disqualified from representing petitioner at the related civil forfeiture proceedings, raising the obvious question as to why she filed an appearance in it. The letter from AUSA Conway to Attorney Lyle dated June 30, 1993 (App. 12) and provided to petitioner's 2255 counsel on August 30, 2004, duly records the basis for Slaughter's disqualification to Lyle. App. 17. Consequently, there was no strategic or tactical reason for Lyle not to cross-examine Andre Jackson with his sworn deposition testimony which contradicted, *inter alia*, the nature and quantity of drugs and petitioner's involvement in the charged offenses. Indeed, Lyle admitted when faced with Jackson's deposition statements that she would have been ineffective if she had had the transcript and not used it to impeach the witness. Instead, Jackson testified *without objection* or impeachment by defense counsel. The importance of Jackson's testimony was due in part to the loss of the drugs allegedly seized at the time.

The foregoing demonstrated that the effectiveness of trial counsel was not challenged solely because of an undisclosed conflict of interest - one known to the court, the government, and defense counsel at the time of trial. Lyle testified that had she had a copy of it, she would have been ineffective not to have used it. Lyle also testified, without contradiction, that petitioner was illiterate and that she had to read everything to him. Finally, it was revealed that both Andre Jackson and Rodney Williams (petitioner's co-defendant) at separate trials, were given express Fed.R.Cr.P. 44 admonitions unlike Mr. Penny.

On this record, the courts below denied petitioner's request for a certificate of appealability.

REASONS FOR GRANTING THE WRIT

1. The Record Below Unequivocally Contradicts the District Court's Finding that He Did Not Have "Jurisdiction" Over Petitioner's Claims of Ineffective Assistance of Counsel. Dismissal of a Section 2255 Petition that Raises Ineffective Assistance of Counsel as "Untimely" Where Evidence of such Ineffectiveness of Counsel Is Received While the Petition Is Pending, Falls within the Exceptions to the AEDPA's Limitations Period. To Hold Otherwise Constitutes an Unconstitutional Suspension of the Writ.

The district court found that he did not have "jurisdiction" to review the merits of petitioner's 2255 petition because it was "untimely"under the one-year limitations period of the AEDPA. App. 38. Then both it and the court of appeals found no basis to issue a certificate of appealability, effectively terminating petitioner's right to challenge the constitutionality of his custody. This finding, triggered solely by application of the AEDPA, in the context of this case, effectively violates the constitutional prohibition against suspending the writ of habeas corpus, permitting an act of Congress to trump petitioner's Sixth Amendment right to the effective assistance of counsel.

28 U.S.C. § 2255 is the statutory replacement for the Great Writ for federal prisoners but is not necessarily completely pre-emptive. See discussion in *Rasul v. Bush*, 542 U.S.466, 1124 S.Ct. 2686, 159 L.Ed.2d 548 (2004). Petitioner filed his petition within three months of discovering that his original trial attorney was the subject of a federal drug trafficking investigation and had been disqualified, not only in petitioner's civil forfeiture pro-

ceedings - with all proceedings under seal - but in at least three other federal criminal cases. One of the issues raised in the original petition was that of an undisclosed conflict of interest in a joint representation situation, aggravated by the failure of the trial court to conduct any kind of an inquiry under Fed.R.Crim.P. 44 before trial, as to whether petitioner understood and waived his right to conflict-free counsel. The district court determined that the petition was untimely, that the illiterate petitioner could have, through the exercise of due diligence, known that references at his trial to "Attorney X" were in fact to Chester Slaughter. That finding effectively upholds the same court's refusal to grant the government's sealed motion to disqualify petitioner's trial counsel, Freddrena Lyle, for precisely those same reasons. The reason for the secrecy was the government was afraid that if petitioner knew that Andre Jackson was its key witness against him, he might retaliate. Jackson had claimed to the government that Slaughter had sought to do a drug deal with him.

The court granted a limited hearing on these issues. The testimony at that hearing established without contradiction that petitioner was illiterate, and that his trial counsel was ineffective in representing him at trial. The petition had been amended to make clear that the Sixth Amendment challenge was based on both the conflict of interest and the effectiveness of trial counsel. The questions and answers of Attorney Lyle revealed that she not only failed to utilize the highly damning deposition testimony of Andre Jackson to impeach him at trial both as to guilt and later, as to sentencing range, but lied to the district court about having the document and about her knowledge as to whether Slaughter had been disqualified in the forfeiture proceedings. The lie became apparent when the government was able to produce several months later a letter addressed to her delivered before the trial

clearly referencing the disqualification of Chester Slaughter and producing the Andre Jackson deposition transcript. Under this Court's most recent scope of representation decision, *Rompilla v. Beard*, 125 S.Ct. 2456 (2005), a duty to investigate a court file which would have revealed helpful personal information about a defendant accused of murder was found to be ineffective assistance of counsel, the reason being that defense counsel knew that the State was going to seek the death penalty. 125 S.Ct. at 2464. Here, defense counsel knew that Andre Jackson was the critical witness for the government both as to petitioner's guilt or innocence and to the sentence imposed if found guilty. And defense counsel had his deposition testimony, which was replete with serious contradictions with what would be his testimony at petitioner's trial. While petitioner contends that on the merits this was *per se* ineffective assistance of counsel, equally relevant is that the predicate information was received from the government in 2004, and therefore the petition was timely. To hold otherwise, under the facts of this case, would be an unconstitutional suspension of the writ, in violation of Article I, § 9, cl. 2. Moreover, claims of ineffective assistance of counsel, backed by a failure of the government to request, or of the court to inquire of the defendant whether he understood his right to conflict-free counsel and further backed by evidence that trial counsel had received powerful impeachment evidence and failed to use it - indeed falsely claimed that they never received it - it was substantial enough evidence of a constitutional violation to require issuance of a certificate of appealability.

2. This Court, Under Its Supervisory Powers over the Federal Courts, Should Require that the District Courts Conduct *Garcia* Inquiries into Joint Representation and Conflicts of Interest under Federal Rule of Criminal Procedure 44, and Hold Here that the Record Requires a New Trial Because of the Lack of an Effective Waiver of Conflict-Free Counsel in Violation of the Sixth Amendment.

In *United States v. Garcia*, 517 F.2d 272 (1975), the Fifth Circuit found that "defendants enjoy the right to knowingly and intelligently waive any disqualification noted by the district court." This holding reflects the limits imposed by this Court on waivers of constitutional rights. *E.g.*, *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Brady v. United States*, 397 U.S. 742 (1970). The *Garcia* court held that a district court should "follow a procedure akin to that promulgated in F.Crim.P. 11, whereby the defendant's voluntariness and knowledge of the guilty plea will be manifest on the face of the record. As in Rule 11 Procedures, the district court should address the defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. He must voluntarily waive his Sixth Amendment right. It is, of course, vital that the waiver be established by clear, unequivocal, and unambiguous language."

Here, the government was aware of the conflict of interest as it used the identical information in both the civil forfeiture and the criminal prosecution. But the government, having the information, did not seek a *Garcia* hearing to discover if petitioner was aware of the conflict, even though it had moved to disqualify Freddrena Lyle. And no *Garcia* hearing was held. The government's earlier Motion to Disqualify Slaughter at the civil forfeiture was under seal.

Consequently, without judicial inquiry, disqualified counsel's closest associate became counsel of record in both the forfeiture action and the criminal trial. The non-disclosure of this information violated petitioner's right to conflict-free representation. *Glasser v. United States*, 315 U.S. 60 (1942); *Cuyler v. Sullivan*, 466 U.S. 335 (1980). The Seventh Circuit in *United States v. Fish*, 34 F.3d 488 (1994) held that a trial court must adequately inquire into any conflict of interest. Here, the court was aware of the conflict, the government having moved to disqualify Ms. Lyle before trial. At a minimum, given the government's pretrial motion to disqualify Lyle, it should have sought the court to make appropriate inquiries of both Attorney Lyle and of petitioner. Being told that "your attorney might sell you out to help himself" can cause a defendant to seriously consider whether he wishes to be represented by that attorney. See *United States v. Hubbard*, 22 F.3d 1410, 1418-19 (1994).

The Court, under its supervisory powers, should impose an obligation upon the trial courts to obtain personal waivers of the right to conflict-free counsel and find that the lack of any such procedure here violated petitioner's right to counsel. *See Castro v. United States*, 540 U.S. 375, 383 (2003).

CONCLUSION

For the reasons above stated, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding denying petitioner a certificate of appealability.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted April 1, 2005

Decided May 3, 2005

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

No. 04-3891

JONATHAN PENNY, *Petitioner-Appellant,*	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 99 C 2839
UNITED STATES OF AMERICA, *Respondent-Appellee.*	)	**Wayne R. Andersen**, *Judge*

ORDER

Mr. Jonathan Penny has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2255, which we construe as an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

App. 2

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge
Wayne R. Andersen

CASE NUMBER
99 C 2839

DATE
3/29/2005

CASE TITLE
United States of America vs. Penny

DOCKET ENTRY TEXT:

The Court dismissed the petitioner motion for a writ of habeas corpus and denied the motion for judgment on the pleadings on 9/23/2004. This case is hereby dismissed.

IN TILE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JONATHAN PENNY,	)	
	)	
Petitioner,	)	
	)	Criminal #92-CR-448-1
v.	)	Civ 99C-2839
UNITED STATES OP	)	
AMERICA,	)	Hon. Wayne R. Andersen,
	)	Judge Presiding
Respondent.	)	

NOTICE OF MOTION and
CERTIFICATE OF SERVICE

To: James Conway, Assistant U.S. Attorney
219 S. Dearborn St.
Chicago, Illinois 60604

PLEASE TAKE NOTICE that on November 5, 2004, at 10 a.m, the undersigned will appear before the Hon. Wayne R. Andersen in courtroom 1403, 219 S. Dearborn St. Chicago, IL. 60604, or any judge sitting in his stead and present the attached Motion for Reconsideration. A copy of this Notice and Motion and of the Reply are personally s you at the office of the United States Attorney, address above, this 5th day of November 2005.

/s/ John Thomas Moran, Jr.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

JONATHAN PENNY,	)	
	)	
Petitioner,	)	
	)	Criminal # 92-CR-448-1
v.	)	Civil # 99C-2839
UNITED STATES OP	)	
AMERICA,	)	Hon. Wayne R. Andersen,
	)	Judge Presiding
Respondent.	)	

MOTION FOR RECONSIDERATION OF DENIAL OF CERTIFICATE OF APPEALABILITY AND DENIAL OF AMENDED PETITION UNDER 28 U.S.C. § 2255.

NOW COMES, the Defendant/Petitioner, Jonathan Penny, and respectfully moves this Honorable Court, pursuant to Federal Rule of Civil Procedure 59(e), 28 U.S.C. §2255, and the Due Process Clause of the Fifth Amendment of the U.S. Constitution, to grant reconsideration of its decision to (a) deny the instant Section 2255 amended petition and (b) its denial of petitioner's request for a certificate of appealability. In support whereof, Petitioner states as follows:

The amended petition for relief here was *not* predicated solely on the conflict of interest of petitioner's trial counsel. Rather, the claim stated attacked the effectiveness of petitioner Penny's trial counsel on two different bases: (a) that trial counsel labored under an undisclosed conflict of interest, and (b) regardless, that trial *and* appellate counsel were ineffective. Separately, petitioner claimed

that the district court, aware of the potential conflict of interest between petitioner and his trial counsel, should have conducted a hearing following the lead of the Fifth Circuit in *United States v. Garcia*, 517 F.2d 272 (1975) and the demands of Federal Rule of Criminal Procedure 44, a requirement that this Court itself candidly admitted it did not follow.

JURISDICTION

This Court has jurisdiction over this motion under Federal Rule of Civil Proc. 59(e). See *Browder v. Director, Department of Corrections of illinois*, 434 U.S. 257, 269, 54 L. Ed. 2d 521, 98 S. Ct. 556 (1978). While the amended Habeas Corpus Rules confer "ample discretionary authority" on district courts "to tailor the proceedings" in habeas cases, see *Lonchar v. Thomas*, 517 U.S. 314, 116 S. Ct. 1293, 1299, 134 L. Ed. 2d 440 (1996), those Rules do not cover the instant situation. In addition, the Court here did not invite the United States Attorney to file a motion to dismiss and did not require the government to answer, constituting plain error. *Ukawabutu v. Morton*, 997 F. Supp. 605,60940 (D. N.J. 1998). Thus, if the court does not summarily dismiss a petition, "the judge shall order the respondent to file an answer or other pleading. . . or to take such other actions as the judge deems appropriate." Hab. Corp. R. 4.

The Court's Memorandum Opinion makes several findings of fact without any factual basis in the record to support them. Indeed, the testimony at the limited evidentiary hearing contradicts those conclusions or requires further examination and discovery, while underscoring both the raison d'etre of Fed.R.Cr.P. 44 and the importance of the failure to conduct such inquiry on the record here at the beginning of petitioner's criminal trial.

The issues raised in the Amended Petition were two-fold and not limited to the conflict of interest of petitioner's trial counsel. To repeat, they were:

1. **WHETHER PETITIONER RECEIVED INEFFECTIVE ASSISTANCE THROUGHOUT HIS CASE.**

2. **WHETHER TRIAL COURT'S FAILURE TO CONDUCT A GARCIA HEARING DEPREIVED PETITIONER OF HIS SIXTH AMENDMENT RIGHTS.**

   A. **WHETHER FAILURE TO INFORM PETITIONER OF HIS COUNSEL'S DISQUALIFICATION RESULTING FROM NUMEROUS CONFLICTS ROBBED PETITIONER OF HIS RIGHT TO COUNSEL OF HIS CHOOSING.**

The Memorandum Opinion deals solely with the issue of trial counsel's actual or potential conflict of interest in finding that Petitioner knew or should have known that his attorney, Freddrena Lyle, labored under at [a potential conflict of interest, within the one-year statute of limitations created by the AEDPA, and therefore, the Court was "without jurisdiction" to entertain the claim. However, the Mem.Op. also states that:

> "common sense dictates that had Lyle [trial counsel] been loyal to [Chester] Slaughter, she would have wanted to discredit [Andre] Jackson, a result that would have benefitted both Slaughter and Penny." (Mem. Op. 4)

The answer to this is simple: Lyle testified at the hearing that (a) she did not know about the existence of the deposition transcript of Andre Jackson, a deposition that was noticed to Chester Slaughter at the Slaughter/Lyle firm and which neither Slaughter nor Lyle or anyone associated with them attended. Lyle also testified (b) that if the deposition contained the damning and impeaching

testimony laid out in Petitioner's pleadings here, she would have used it to impeach Andre Jackson's credibility. And Lyle testified that she did not know that her partner, Chester Slaughter, had been disqualified from representing Petitioner at his related civil forfeiture proceedings even though that was the reason she appeared in that matter for Penny. What puts the lie to her testimony that she was unaware of any conflict of interest with Petitioner is her conduct at the forfeiture proceedings: she permitted the proceedings to end by default in favor of the government.

At the end of the evidentiary hearing, AUSA James Conway indicated that he had provided Petitioner's trial counsel with a copy of the Andre Jackson deposition *before* Petitioner's criminal trial and would provide Penny's habeas counsel with a copy of same. Mr. Conway did so on August 30, 2004. providing a copy of a June 30, 1993 letter addressed to Ms. Lyle and Rhoda Sweeney which both lists the Andre Jackson transcript as an included document, but more importantly, affirmatively states what Lyle has denied here: that her partner, Chester Slaughter, had been "disqualified in the Penny civil forfeiture case in front of Judge Kocoras. That was based on Andre Jackson's testimony that Slaughter brokered a cocaine deal between himself and Penny. Slaughter had represented Jackson during his trial. He later fired Slaughter and retained new counsel." (06/30/93 letter, p. 4) Page two of the "ENCLOSURES" INDEX affirmatively references the deposition transcript. Lyle told this Court that she did not know about it, did not have it, and would have aggressively used it in cross-exammation. (Trans. 55)

What the hearing testimony as to Lyle on the question of notice of conflict was short: she did not discuss the impact of any conflict with Joe Penny. (Trans. 32) Moreover, she testified that a[illegible] to Petitioner's literacy in 1993 that she had to read everything to him, and that the government

was equally aware that he was illiterate. (Trans. 28-29) Attorney Barry Spevack conceded that he did not know if someone wrote letters to him for Petitioner nor did he have actual knowledge as to whether Petitioner was literate or not. (Trans. 22) Of course he never met Petitioner and did not recall ever speaking to him on the telephone (Trans. 6,7) As to her actual ineffectiveness, the issue not ruled upon by this Court, she testified as to the Andre Jackson deposition that she would have used it in preparing her case for trial. (Trans. 35) She conceded that Chester Slaughter met with her and Penny before and during the criminal trial and had no doubt 'that Slaughter could have told Penny that he was running the show through her. (Trans. 40) In its Memorandum Opinion, the Court finds that it believes Petitioner "knew about the relationship between Slaughter and Lyle and the identity of Attorney X at the time of the trial." The record at the evidentiary bearing reveals that the only reference to an "Attorney X" In Petitioner's presence occurred in Lyle's opening statement-once. Every other reference occurred at sidebars which Petitioner did not attend. The suggestion that Penny knew earlier is contradicted in great detail by the exposition of the chronology in the Reply Memo, noting the extent to which the government was *not* revealing such a connection out of a fear of retaliation against Jackson.

But if Lyle is credible as to her testimony that she had some discussions with Petitioner concerning Chester Slaughter, she is equally credible as to her assertions concerning why she did not use Andre Jackson's deposition transcript in defending the case. As noted in our Reply Memo, Jackson's statements impact both his credibility as a wilness against Petitioner but also as to his credibility at sentencing as to the amount of contraband present. This is vitally important because the government "lost" the evidence it claimed to have seized from Penny or Penny-controlled properties. Because we have shown in our

memorandum in support of the amended petition and in our lengthy reply how critical the Andre Jackson deposition transcript was to the defense and because, contrary to Lyle's statements, the government provided it to her in its "3500" materials, she was ineffective. In Owens v. United Stares, 2004 U.S. App. LEXES 21641 (7th Cir. 2004), the Seventh Circuit expanded its definition of "prejudice" which now clearly includes trial counsel's serious deficiencies here (if it did not include them before). The court, quoting *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986), stated that:

> "The right to counsel is intended to place a criminal defendant in the approximate position that he would occupy if he were learned in the law and could thus defend himself effectively. * * * The "prejudice" - essential to a violation of the Sixth Amendment right to the effective assistance of counsel is not being convicted though one is innocent, although that is the worst kind; it is being convicted when one would have been acquitted, or at least would have had a good shot at acquittal, had one been competently represented."

Finally, while this matter was under consideration by the Court, the United States Supreme Court issued its opinion in *Blakely v. Washington*, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (June 24, 2004). As this Court is aware, the Supreme Court thereafter granted its writ of certiorari on August 2,2004, in *United States v. Booker* (7th Cir.) (04-104) and in *United States v. Fanfan* (1st Cir.) (04-105) and oral argument has been held. Those cases hold that insofar as a sentencing scheme permits factual issues to be determined by a court without a jury and under a standard less than beyond a reasonable doubt, enhancements or upward departures, other than those based on prior convictions, are unconstitutional Here, the sentencing hearing and the sentence imposed all violate the holding

in *Un ited States v. Booker*. The court is without jurisdiction to amend the indictment. If the Supreme Court finds the Federal Sentencing Guidelines to be indistinguishable from the State of Washington's, as almost every Federal Circuit has, and the holding is retroactive, then Petitioner is entitled to be resentenced.

Respectfully submitted,

/s/ John Thomas Moran, Jr.

JOHN T. MORAN & ASSOCIATES
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(312) 630-0200

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J.moran@comcast.net

VIA U.S. MAIL AND TELEFAX (312-353-4324)

August 20, 2004
James Conway
Assistant U.S. Attorney
219 S. Dearborn St.
Chicago, Illinois 60604

Re: *J Penny v. United States*, Case Nos. 92-CR-448-1 and 99 C 2839- Follow up on request for document

Dear Jim:

On May 5, 2004, at the conclusion of our arguments, I asked you if you had any documents referencing your office turning over to Ms. Lyle a copy of the deposition of Andre Jackson that was taken pursuant to notice in the civil forfeiture matter before Mr. Penny's criminal trial. You had indicated that you believed that you had, would look for it, and send me a copy of same. I recalled that Ms. Lyle testified that she had not seen it or she would have used it. Have you had an opportunity to check your records by now regarding production of same. Please let me know as soon as possible as I am tying up as many loose ends as possible. I would also like a copy of Penny's indictment if you have one.

Sincerely,

/s/ John Thomas Moran, Jr.

United States Attorney
Northern District of Illinois

James M Conway
Assistant United Stales Attorney
Everett McKinley Dirksen Building
219 South Dearborn Street Ste, Suite 500
Chicago. Illinois 60604

August 30, 2005

John Moran
John Moran and Associates
309 W. Washington Ave. Suite 900
Chicago, Illinois 60606

Re: Jonathan Penny

Dear John:

Enclosed is a copy of my file copy of a letter dated June 30, 1993 and addressed to Ms. Lyle and Ms. Sweeney pursuant to your request. Please note that the Slaughter allegation is described on page 4 and that a copy of Jackson's deposition is listed along with other "3500" material provided to the defendants through their counsel on the Enclosure list on page 2.

You have also requested a copy of the Penny indictment. I have enclosed a copy of that as well.

Very truly yours,

/s/ James M. Conway
Assistant United States Attorney

June 30, 1993

Freddrenna M. Lyle
Smith and Lyle
Attorneys At Law
850 West Jackson Boulevard
Suite 701
Chicago, Illinois 60607

Rhoda Sweeney
53 W. Jackson Boulevard
Suite 1534
Chicago, Illinois 60604

Re: United States v. Jonathan Penny and Rodney Williams, 92 CR448

Dear Ms. Lyle and Ms. Sweeney,

Enclosed with this letter are various documents that are outlined on the attached sheet.

I would like to remind you that this document, as well as the documents previously given to you, on the subject of a protective order entered by the Court when the case was first indicted. As you will recall, the protective order basically states that you are to use these documents for no other purpose than our trial, you will not show or give copies of these to anyone except as authorized under the terms of the order, and you will return such documents to the government at the conclusion of the case.

I expect Special Agent Tony Butzek, I.R.S., will prepare summary charts to outline some of the financial evidence relating to Mr. and Mrs. Penny. They will probably be prepared right before trial. I will get them to you as soon as possible. As stated previously, all source documentation in this case, be it obtained through search warrants, subpoenas or otherwise, is open and available for your inspection.

I have reviewed the taped conversation between Mr Penny and Carl Jackson, that being the only recorded conversation for which the tape recording worked. I intend to redact certain portions of the tape that are irrelevant

such as Penny's discussion about his civil matter and some phone calls with other individuals, I will give you a cleaned up transcript to compare to the one previously given to see if you have any objections to the redactions.

As you know certain items were seized in and around certain "Penny" properties by Marshals, IRS and DEA in April 1989. My hope is to call one agent who can identify the physical evidence and use Tony Butzek who was present at 1801 Adams to identify the financial records as opposed to calling a number of agents. If you think that you would rather have a number of agents called to the stand to say specifically that they were the ones who found the evidence as opposed to the "summary" agents, please let me know. Mr. Penny's house was videotaped during the search. I am probably going to play that tape at trial to show the contents of his house. Those tapes, as well as all of our photographs of various items, such as the load cars and secret rooms are available to you as well.

As you know, Marshals searched one of Mr. Penny's secret drug rooms at 2126 W. Warren. Drug paraphernalia, as well as a machine gun were recovered. The Marshal's Office tells me that they cannot locate the drug items in their warehouses. We do have the gun and we do have photos of the drug items taken at the time of the search that we will introduce into evidence.

You have both indicated preliminarily that you and your clients will stipulate to the business record foundation for the various documents the government will introduce into evidence. I will also assume that understanding, for public documents such as car title records from the State of Illinois. I will draw up the stipulations as I mark the exhibits in the next day or so. If this does not comport with your understanding, please let me know immediately as it will entail contacting another 50 witnesses or so.

I will also assume you will stipulate for the lab testing on all drugs.

William Bauer—

Bauer has been paid or had money spent on his behalf of $2700 according to DEA. He and his wife were told that they would be put in for reward money based on any seized property up to 10% of the total amount seized, subject to any regulatory maximum. The Bauer's have not been paid any reward money to date.

Bauer has cooperated and is cooperating with federal and local authorities in other unrelated cases such as U.S. v. Tocco. There are references to some of the cooperation in the material provided. I do not intend on obtaining and turning over any statements made in the cases, and ongoing investigations as they are irrelevant to the case at trial. If you wish us to obtain and produce such records, please give us notice to present the matter to Judge Anderson.

As outlined in the Wisconsin Governor's Pardon Advisory Board material, various individuals have sent letters outlining Bauer's cooperation to the board. I do not have such letters other that AUSA Polales', which has been turned over. I have asked Bauer to bring his copies of such letters with him. I will provide them to you at that time. I am not sure, but I believe that if you want the actual letters or other material from the Parole Board, you may need a court order from Judge Anderson. AUSA Polales sent a copy of his letter to the Lake County States Attorney's Office to advise them of the information contained in the letter. It is my understanding, that each and every time Mr. Bauer has requested, the federal government has made known the extent of his cooperation to various governmental authorities at federal and state levels.

Bauer has been in the Witness Security program since 1990. He was told by Officer Evans initially that if he cooperated with DEA that he could spend time in a federal institution as opposed a Wisconsin facility. Bauer expects

to return to a state facility after testifying in our case. While in the program, another inmate accused Bauer of being involved in a murder plot. Bauer denies this and took a polygraph, the results of which have been provided to you. We will not turn over the underlying reports detailing the inmates allegations as we deem them irrelevant. Should you desire them, we will ask Judge Anderson to review them in—camera for a judicial determination that you are entitled to such records.

In 1992, a boyfriend of a girlfriend of Bauer was advised that if he attempted to divulge the whereabouts of Bauer that he would possibly be charged with obstructing justice.

DEA and the United States Attorneys Office had contacts with the Wisconsin District Attorney's Office in an attempt to advise them of Bauer's cooperation in order to assist Bauer in having his sentence reduced. Base on those intercessions, the local authorities recommended a sentence of 12 years when his exposure was 35 years to the sentencing judge. Bauer had cooperated for them as well, testifying against a co-defendant in an armed robbery case aswell as providing information on a planned jail break by other inmates. Bauer received a sentence of 16 years.

Bauer has never been charged federally based on the information he provided to federal authorities.

Joanne Bauer—

She was told by DEA that she would not be charged if she cooperated and told the truth about her drug dealing with Joe Penny. She was also advised she would be eligible for a reward of up to 10% of any property seized in the case. She has not received any reward money. She has received or had money spent on her behalf of $6,200 from DEA, primarily for her relocation that DEA paid for after she received a death threat in this case. Because of the threat, although she has a new last name, she will be

referred to throughout the trial as Joanne Bauer so as not to disclose her new name. The death threat was on the Bauer's phone answering machine. We cannot currently locate the tape, but the retired case agent believes the voice making the threat was Michael Penny.

Andre Jackson—

Mr. Jackson began cooperating with authorities after his conviction in 1989. He has cooperated in numerous cases and continues to do so. He has always maintained that he is innocent of the ounce deal that he was convicted of. He received an initial sentence of 21 months in 89 CR 869. He was subsequently charged in a criminal information in89 CR 942, and pleaded guilty. He received a sentence of 42 months. His plea agreement did not call for him to forfeit any property obtained through his drug dealing. His sentence was later reduced to 21 months via a motion to reduce filed by the government. While incarcerated, the government arranged for Jackson to be let out on bond in order to cooperate in ongoing investigations. As you are aware, Chester Slaughter was disqualified in the Penny civil forfeiture case in front of Judge Kocoras. That was based on Andre Jackson's testimony that Slaughter brokered a cocaine deal between himself and Penny. Slaughter had represented Jackson during his trial. He later fired Slaughter and retained new counsel.

Andre Jackson tested positive once for cocaine while on probation. A copy of the report is enclosed. The only punishment he received was that his terms of release were modified to include drug conditions as stated in Judge Norgle's order which is attached to the probation report. He denies having used cocaine, no other testing has reflected the presence of cocaine.

I've attached a memo received this week concerning a CI alleging Andre was involved in a murder. Mr. Jackson denies the allegations contained in the memo.

Mr. Jackson has received or had money spent on his behalf of $3,843 for expenses and information according to DEA records.

Carl Jackson — Carl Jackson has not received any money or received any benefits from the government. He has not been charged for any criminal activity for which he has told the government. Carl Jackson states that he was told by CPD Officer Evans that if he would cooperate that he would not be charged criminally for his own conduct which indicates years of drug dealing. He states that the reason he as agreed to cooperate with the government, which like his brother, consists of assisting the government in other investigations, some still ongoing, is that he wanted to help his brother, Andre.

Very Truly Yours,

Michael J. Shepard
United States Attorney

By: _____

James M. Conway
Assistant United States Attorney
United States Attorney's Office
219 S. Dearborn - Room 1200
Chicago, IL 60604

ENCLOSURES

Statements	Date/Agency	
Earlia Adams	4/05/89	IRS
Pat Bailey	4/05/89	IRS
Bill Bauer	6/08/89	Draft Statement
	6/19/89	IRS

6/26/89	Statement
8/10/90	
7/12/89	Steve Crocker Letter
11/02/89	Public Defender Letter
3/01/90	Witness Security Application
7/14/89	Wisc. Judgment and Conviction Order
6/07/89	Proffer Letter
Updated Wisconsin newspaper article	

Statements	Date/Agency
2/04/92	Letter from Dean Polales to Governor's Pardon Advisory Board
NCIC Arrest Record	
10/28/89	Letter Crocker from Bauer
12/04/89	Letter to Crocker from Wisc. DA
1/01/89	Letter to Crocker from Bauer
1/01/90	Letter to Polales from Bauer — redacted
11/21/92	Letter to Maim from Bauer — redacted
11/23/92	Letter to Polales from Bauer redacted
12/05/92	Letter to Polales from Bauer
1/02/93	Letter to polales from Bauer

	1/11/93	Lie detector results — redacted
	1/17/93	Letter to Husz from Bauer — redacted
	1/17/93	Letter to Polales from Bauer
	4/01/ 93	Letter to Polales from Bauer
	9/17/92	Letter to Polales from Bauer redacted
Joanne Bauer	5/12/89	DEA
	8/30/89	Handwritten
	10/10/90	DEA
Ziggy Bednarz	4/04/89	IRS
Richard Boyd	3/22/89	IRS
Michael Blount	4/26/89	IRS
John Carrozza	5/02/89	IRS

ENCLOSURES

Statements	Date/Agency	
Stuart Cohen	4/05/89	IRS
	5/02/89	IRS
	5/03/89	IRS
Sandra Cooper	8/23/90	Handwritten
Bernice Crawford	4/17/89	DEA
James Dunk	4/27/89	IRS
Miranda Goodwin	4/05/89	IRS
Ronald Hayden	5/24/87	IRS

Andre Jackson	4/20/89	Personal History
	9/25/90	Status of Andre Jackson
	9/25/90	Sentencing of Andre Jackson
	7/23/91	Deposition
	10[illegible]/89	Grand Jury — redacted
		Copy of Information & Plea Agreement
		Rap Sheet
		Probation Report — Drug Testing

Statements	Date/Agency	
	4/24/89	Pre-trial Services Report
	12/17/89	P.S.I. Report
	1/12/89	Government's Version
	7/20/89	Government's Version
	12/04/87	New Jersey Police Report
	12/21/87	New Jersey Police Report
	2/01/88	New Jersey Police Report
		Judgment Order. - 89 CR 369
		Motion to Reduce Sentencing
	4/02/90	Morris County Letter — 4490 and Affidavit
		Indictment 89 CR 369
	11/20/89	Memo of Agreement
	6/23/93	Memo to Conway from

		McClellan
Carl Jackson	6/25/90	DEA Debriefing
	7/10/90	Statement of Carl Jackson Rap Sheet
Maudeen Johnson	8/20/89	Handwritten
Maurie Katz	5/30/89	IRS
Peter Loeb	4/25/89	IRS
Dorothy Lucas	8/22/90	Handwritten
Bernice Metoyer	4/05/89	IRS
	4/05/89	IRS
Henry Mlkola	4/14/89	IRS
Clara Penny	4/05/89	IRS
Michael Penny	4/05/89	IRS
Doris Robinson	4/05/89	IRS
Peter Sanchez	5/09/89	IRS
Jerry Sawka	2/27/92	IRS

ENCLOSURES

Statements	Date/Agency
Eva Sturges	4/26/89 IRS
Nat Wolsky	5/09/89 IRS
Estelle York	8/24/90 ?

DEA MISCELLANEOUS

Acquisition of	N—53	9/14/90

Acquisition of	N-53 9/17/90
Acquisition of	N—55 9/27/90
Acquisition of	N—54 9/27/90
Lab #3	7/10/90
Lab #2s	4/02/90
Marshal Memo	4/02/90
Debriefing of Source	4/06/89
Phone Call Analysis	3/01/89
Case Status	12/09/88
Case Status	4/11/88
Case Status	2/10/88
New Jersey Report	12/14/87
	2/08/88
	Undated
	2/01/88
	2/01/88
	2/01/88
	12/04/87
	12/04/87
	12/04/87
	2/04/88
	12/04/87
	12/21/87
	2/01/88
	2/01/88

Case Initiation 12/18/87

Seizure—New Jersey 12/16/87

Evans as paid	
Consultant memo	undated
Roy HIll 9/24/90	Deposition
Peter Loeb 8/20/90	Deposition
Jonathan Penny, Jr. 9/17/90	Deposition
Lavada Penny 9/17/90	Deposition
Miranda Goodwin 9/17/90	Deposition
James }folston 9/07/90	Deposition
Jonathan Penny 3/30/92	Deposition
Peter Sanchez 8/02/91	Deposition

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge
Wayne R. Andersen

CASE NUMBER
99 C 2839

DATE
11/18/2004

CASE TITLE
United States of America vs. Jonathan Penny

Plaintiffs motion for reconsideration

DOCKET ENTRY:

(1) ■ Filed motion of [use listing in "Motion" box above.]

(10)■ [other docket entry] Motion is taken under advisement. Response due on or before 12/17/2004.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IWNOIS
EASTERN DIVISION

JONATHAN PENNY,	)	
	)	
Petitioner,	)	
	)	No 99-CV-02839
v.	)	Civil # 99C-2839
UNITED STATES OP	)	
AMERICA,	)	Hon. Wayne R. Andersen,
	)	Judge Presiding
Respondent.	).	

NOTICE OF APPEAL

To: James Conway, Assistant U.S. Attorney
219 S. Dearborn St.
Chicago, IL 60604

Notice is hereby given that Jonathan Penny, Petitioner in the above named cases hereby appeals to the United States Court of Appeals for the Seventh Circuit from the United States District Court, Northern District of Illinois.

/s/ John Thomas Moran, Jr.

John T. Moran & Associates
309 W. Washington Street
Suite 900
Chicago, IL 60606
Office: 312-630-0200
Cell 312-405-4474

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of the Assigned Judge
Wayne R. Andersen

CASE NUMBER
99 C 2839

DATE
October 22, 2004

CASE TITLE
Jonathan Penny v. USA

DOCKET ENTRY:

(10) ■ [Other docket cntry]

We deny petitioner's request for a certificate of appealability.

(11) ■ [For further detail see order on the reverse side of the original minute order.]

ORDER

This matter is before the Court on the request of petitioner, Jonathan Penny, for a certificate of appealability pursuant to 28 U.S.C. 2253(c). For the following reasons, we deny petitioner's request.

On September 23, 2004, this Court dismissed the petitioner's motion for a writ of habeas corpus. We specifically found that the petitioner had failed to file his § 2255

petition timely under the 1996 Antiterrorism and F.ffective Death Penalty Act. That finding was determined after this Court gave the petitioner a full and fair hearing as to his claimed exception of newly discovered evidence. We concluded that Penny has not presented any evidence that hi.s petition is supported by any newly discovered facts

28 U.S.C. § 2253(c) provides that a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. In this case, we believe the petitioner has not made a substantial showing of the denial of a constitutional right. We believe there to be no issues that are debatable among jurists of reason, or which could possibly indicate the denial of a constitutional right.

Therefore, we deny petitioner's request for a certificate of appealability. It is so ordered.

/s/Wayne R. Andersen
United States District Court

Dated: October 22, 2004

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

JONATHAN PENNY,	)	
	)	
Petitioner,	)	No. 99 CV 02839
	)	Criminal # 92-CR-448-1
v.	)	Civil # 99C-2839
UNITED STATES OP	)	
AMERICA,	)	Hon. Wayne R. Andersen,
	)	Judge Presiding
Respondent.	)	

NOTICE OF FILING AND
CERTIFICATE OF SERVICE

TO: James M. Conway
Assistant United States Attorney
219. South Dearborn Street
Chicago, illinois 60604

PLEASE TAKE NOTE that on October 5, 2004, I have caused to be filed with the Clerk of the Court **PETITIONER'S REQUEST FOR CERTIFICATE OF APPEALABILITY PURSUANT TO 28 U.S.C. 2253(c).**

I further certify that I have caused a copy of the foregoing to be placed in a sealed envelope and addressed as above and deposited in the U.S. Mail before 5:00 p.m. this 5th day of October 2004.

Respectfully submitted,
JOHN T. MORAN & ASSOCIATES

/s/ John T. Moran, Jr.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JONATHAN PENNY,	)	
	)	
Petitioner,	)	
	)	Criminal # 92-CR-448-1
v.	)	Civil # 99C-2839
UNITED STATES OP	)	
AMERICA,	)	Hon. Wayne R. Andersen,
	)	Judge Presiding
Respondent.	).	

JONATHAN PENNY'S REQUEST FOR CERTIFICATE OF APPEALABILITY PURSUANT TO 28 U.S.C. 2253(c)

Now comes your petitioner, JONATHAN PENNY, by and through his attorney, John Thomas Moran, Jr., and requests. this Honorable Court issue a certificate of appealability as to the following claims raised in his petition:

1. Claim 1: The. 1996 Antiterronsm and Effective Death Penalty Act ("AEDPA") was improperly applied to Petitioner's claims and has been used as a bar to all relief. Petitioner maintains that the court incorrectly computed dates and exceptions as to AEDPA's applicability to the current matter; thus the Court barred all of Petitioner's claims.

2. Claim:2 The court made factual determinations, contrary to direct testimony which were used to determine the applicability of AEDPA and the cut-off date for the filing of Petitioner's ineffec-

tive assistance of counsel claim. Petitioner seeks a review of the record and all inferences there made.

3. Claim 3: Given the potential gravity of the conflict of interests as recognized by AUSA Terry Kinney and Jim Conway and the fact that Petitioner is illiterate and unable to read any Court filings himself, it was incumbent on the Court to insure that Petitioner was aware of any conflict and made a knowing and intelligent decision to wave all imputed and presumed conflicts. Petitioner's awareness of this right tolls the statute of limitations imposed by AEDPA.

For all of the foregoing reasons and those in his original Petition and attachments and claims, Petitioner prays that this Court issue a certificate of appealability and permit Petitioner to pursue his writ of habeas corpus and all further relief to which he is entitled.

Respectfully submitted,

/s/ John Thomas Moran, Jr.

**UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS**

Name of Assigned Judge or Magistrate Judge
Wayne R. Andersen

CASE NUMBER
99 C 2839

DATE
September 23, 2004

CASE TITLE
Jonathan Penny vs. USA

DOCKET ENTRY:

(10) ■ [Other docket entry] Enter Memorandum Opinion and Order: The petitioner's motion for a writ of habeas corpus [3-1] is dismissed and the motion for judgment on the pleadings [9-1] is denied.

(11) [For further detail see order on the reverse side of the original minute order.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JONATHAN PENNY,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 99C-2839
UNITED STATES OP	)	
AMERICA,	)	Hon. Wayne R. Andersen,
	)	District Judge
Respondent.	)	

MEMORANDUM, OPINION AND ORDER

The case is before the Court on the petition for writ of habeas corpus filed by Jonathan Penny pursuant to 28 U.S.C. § 2255, challenging his conviction based on ineffective assistance of counsel. Penny also has filed a motion for judgment on the pleadings. The government objects to Penny's petition as untimely and asserts that the motion for judgment on the pleadings is improper. For the reasons set forth below, Jonathan Penny's petition for writ of habeas corpus is dismissed, and the motion for judgment on the pleadings is denied.

BACKGROUND

On September 10, 1993, Jonathan Penny was convicted of conspiracy to distribute narcotics and distribution of narcotics. Thereafter, on August 2, 1994, Penny was sentenced to a term of imprisonment for 25 years to be followed by supervised release for the remainder of his life. Penny filed an appeal and the Seventh Circuit affirmed his conviction on July 26, 1995. See *United States v. Penny*, 60 F.3d 1257 (7th Cir. 1995). On March 22, 1999, Penny filed

a Section 2255 petition, in addition to supplemental amendments to the petition, captioned Motion to Vacate, Set Aside or Correct a Sentence and Supporting Memorandum.

DISCUSSION

I. Section 2255 Petition

In his petition, Penny claims that his attorney, Freddrenna Lyle, provided ineffective assistance of counsel because her primary loyalties were to Chester Slaughter, Penny's original lawyer, rather than to Penny himself. Slaughter, Penny's long-time lawyer, represented Penny and his wife in a civil forfeiture proceeding related to the underlying criminal case. Slaughter was disqualified in the forfeiture case because Andre Jackson, a key government witness against Penny, had accused Slaughter of offering to broker a drug deal between him and Penny. After his disqualification, Slaughter suggested that Penny retain Lyle, his office mate. Penny took the advice and hired Lyle as his attorney.

Penny claims that he was unaware of the real reason for Slaughter's disqualification from the civil forfeiture case. According to Penny, if he had known that Slaughter was a target in the investigation, he would not have hired Lyle. Penny claims that Lyle, as Slaughter's office mate and law partner, allegedly failed to present defenses and evidence at trial that would have aided Penny's defense, because they would have implicated and led to further investigation of Slaughter. Penny also claims that he was unaware that the identity of "Attorney X," who was referenced at Penny's trial by the Court, defense counsel and the government, was in fact Slaughter. In his petition, Penny asks the Court to find that he received ineffective assistance of counsel because of Lyle's alleged conflict of interest.

However, the Court need not — indeed it may not — address the merits of these arguments if Penny could have discovered the underlying facts now alleged by him to support his claim for ineffective assistance of counsel by the exercise of due diligence prior to March 22, 1998, which is one year before the date on which Penny filed this petition.

The 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA") creates a one-year statute of limitations for the filing of federal habeas petitions. See 28 U.S.C. § 2255 (1996). The statute states, in pertinent part:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255. For cases that were decided before the enactment of the AEDPA, the statute has been interpreted to bar habeas petitions that were not brought within one year of the effective date of the AEDPA. *United States v.*

Marsello, 212 F.3d 1005, 1009 (7th Cir. 2000). The AEDPA was enacted on April 24, 1996. Thus, Penny should have filed his petition for writ of habeas corpus on or before April 24, 1997 unless, of course, the petition falls within the scope of one of the exceptions to the application of the one-year statute of limitations. The Court held a hearing on May 3, 2004 to determine what Penny knew about the relationship between Lyle and Slaughter and the identity of Attorney X at the time of his trial in 1993. At the hearing, Penny, Lyle and Penny's appellate counsel, Barry Spevack, testified. After listening to all of the testimony of the witnesses and the summary statements given by Penny's attorney and the Assistant United States Attorney at the conclusion of the hearing, this Court concludes that Penny knew about the relationship between Slaughter and Lyle and the identity of Attorney X at the time of the trial.

Moreover, Penny provides little explanation for how Lyle's alleged loyalty to Slaughter would have worked to Penny's detriment. Common sense dictates that, had Lyle been loyal to Slaughter, she would have wanted to discredit Jackson, a result that would have benefited both Slaughter and Penny. Penny hired Lyle because Slaughter specifically recommended her. According to Penny himself, he retained Lyle after Slaughter's disqualification because Slaughter had recommended Lyle. Obviously, Penny himself believed and was aware that there was a close relationship between Lyle and Slaughter. Indeed, Penny testified that at the end of each trial day, he would return to Lyle's office, which was adjacent to Slaughter's, to meet with him to review the events at trial that day and to prepare for the next day of trial.

When asked at the May 3, 2004 hearing why he believed that Slaughter had been disqualified, Penny testified that Slaughter explained that he had been disqualified because he and Penny were "too close of friends." This explanation is not credible because, when questioned further, Penny

admits that he and Slaughter simply had an attorney-client relationship and did not have any greater personal relationship. Surely Penny would not have accepted this explanation. Given the gravity of his legal position, Penny should have, and surely did, find out the actual reason for the disqualification at that time.

We also do not find credible Penny's testimony that he was not aware of the identity of Attorney X at his trial or that he did not inquire about the reference to Attorney X during his trial. At the trial itself, if not earlier, Penny certainly became aware of Jackson's allegations regarding Slaughter. We find credible Lyle's testimony at the hearing that she told Penny about the reference to Attorney X and that Attorney X was, in fact, Slaughter. Indeed, the government had provided Lyle with all of Jackson's statements about Slaughter in its discovery disclosures and pretrial submissions, and Lyle testified that she discussed all of that material with Penny. In addition, in her opening statement which was given in front of Penny himself at the criminal trial in 1993, Lyle specifically stated that Jackson was going to lie about Penny's previous attorney. While Lyle did not mention Slaughter by name, Penny surely had to know about whom she spoke. Also, when Jackson later testified, he accused Attorney X of trying to broker a drug deal between himself and Penny. Based on this, it is the conclusion of this Court that Penny had to know that Attorney X was Slaughter.

However, even if Penny did not know at the time of the trial about Attorney X's identity the exercise of due diligence would have quickly uncovered the whole truth. Interestingly, Penny's attorney on appeal did not even raise these issues. Had Penny been concerned about a conflict between his interests and those of Slaughter and Lyle, lawyer, would have surely inquired into the details of any possible conflict.

In addition, although Penny now claims that he is illiterate (a claim this Court doubts based on the pro se pleadings he has filed), Penny is an intelligent person. The Court reaches this conclusion based on its observations of Penny in court at his trial and sentencing and during the recent hearing and also based on the sophistication of his drug dealing and attendant building construction activities. It is inconceivable to this Court that Penny was not aware of the underlying facts at the time of his trial. Accordingly, Penny has not presented any evidence that his petition is supported by newly disclosed facts. Therefore, Penny should have filed his petition within one year of the enactment of the AEDPA, no later than April 24, 1997. *See Marsello*, 212 F.3d at 1010. Because Penny has not articulated any reason why his petition falls within the statute of limitations imposed by the AEDPA, this Court does not have jurisdiction to review his petition.

II. Motion for Judgment on the Pleadings

Penny also asserts that his petition should be granted because the government failed to file its response by the date set by this Court. The government represents that it did not receive the Court's minute order setting a briefing schedule. However, when it received Penny's motion for judgment on the pleadings, the government filed its response the next day. We accept the government's explanation for its failure to respond, and the motion for judgment on the pleadings is denied.

CONCLUSION

For the foregoing reasons, the Court is without jurisdiction to consider Penny's petition. The matter is dismissed as untimely, and the motion for judgment on the pleadings is denied.

It is so ordered.

/s/ Wayne R. Andersen
United States District Judge

Dated: September 23, 2004

IN THE UNITED STATES DISTRICT COURT 1
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JONATHAN PENNY,	)	
	)	
Petitioner,	)	
	)	Case No. 92-CR-1
v.	)	Civil No. 99C-2839
UNITED STATES OP	)	
AMERICA,	)	Hon. Wayne R. Andersen,
	)	Judge Presiding
Respondent.	)	

NOTICE OF MOTION TO AMEND § 2255 MOTION

COMES NOW, Jonathan Penny in the above captioned cause into the Honorable Court (hereinafter Penny), moving for an order granting Penny leave to amend filed pleadings under 28 U.S.C. § 2255 writ, Motion to Set Aside, Vacate, or Correct Sentence. Penny moves this Honorable Court to proceed simultaneously in said case.

Notice of Motion to Amend § 2255 Writ is being amended for the following reasons:

(1). On June 28, 2000, the Supreme Court issued a Rule of substantial law, and a watershed change in Constitutional law.

(2). Penny will provide the court with a memorandum of law supportive, to amend to previously filed § 2255, and a argument supportive for furhter claims for relief. 'This a'nendment is in assistance to the court in making or determining it's ruling on the merit of Penny filed § 2255 Motion.

(3) Penny moves to amend § 2255 habeas corpus to expand the record with authorities of assistance.

(4). Furthermore Penny could not have discovered authorities earlier to bring all issues to the courts attention. Attached, Memorandum of Law.

Respectfully Submitted;

_____

/s/ Jonathon Penny

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JONATHAN PENNY,	)	
	)	
Petitioner,	)	
	)	Criminal # 92-CR-448-1
v.	)	Civil # 99C-2839
UNITED STATES OP	)	
AMERICA,	)	Hon. Wayne R. Andersen,
	)	Judge Presiding
Respondent.	)	

NOTICE OF MOTION TO AMEND § 2255 MOTION

Comes Now, Jonathon Penny (hereinafter Defendant), in the above captioned Cause, before this Honorable Court moving for a Order granting Defendant leave to file an amended pleading under 28 U.S.C. § 2255. This writ is to Set Aside, Vacate, or Correct Sentence. Simultaneously Defendant moves this Honorable court to proceed with previous pleadings filed.

This NOTICE OF MOTION TO AMEND, 28 U.S.C. § 2255 writ is being amended for the following reasons:

(1). On June 28, 2000, the Supreme Court issued a Rule of Substantial Law, and a Watershed change in Constitutionai aw, practiced.

(2). Defendant will provide the court with a memorandum of law, supportive, to amend the previous filed § 2255, and a argument supportive of claims for re lief, as well as assistance for the court in making a determination, and a ruling on the merits of Defendant's issued filed in this great writ § 2255.

FACTS

Defendant was indicted under Titles 21 U.S.C. § 841, 846, consisting of a criminal conspiracy to allegedly distribute narcotics. On August 30, 1993, a jury trial commenced, and on September 10, 1993, Defendant was found guilty on both charges as charged.

On April 9, 1999, Defendant filed 28 U.S.C. § 2255 Motion to Vacate, Set Aside or correct a Federal Sentence; cause No. 99- c2839. Defendant's Motion to Amend is to be incorporated in Defendant previous pleading and amended to the Supreme Court's holding in Apprendi v. New Jersey, decided 6/28/2000, Case No. 99-478.

Defendant is before the courts to ascertain resolution, due to the principles announced in *Jones*, *Castillo* and *Apprendi*, infra, which preclude the infliction of 21 U.S.C. § 841 et seq., enhancement penalties on a defendant without the grand jury indicting Defendant for the factual elements necessary for the petit jury to find Defendant guilty of those elements beyond a reasonable doubt. See Jones v. United States, 526 U.S. 227 (1999); Castillo v. United States, 68 U.S.L.W 4475 (U.S. June 5, 2000).

Defendant further contest that the sentencing process lacked the reliability, and the general verdict lacked a deter mination as to what the Defendant was actual guilt of. According to the testimony of the Government and this witness on or about the year of 1984 up until September 19, 1990, the Defendant bought and sold multiple quantities of cocaine through out this alleged conspiracy, The Government failed to put the three essential, elements, which are:

One, two or more persons reached an agreement or came to an understanding to possess more than 500 grams of cocaine with the intent to distribute.

Two, the defendant voluntarily and intentionally joined

in the agreement or understanding, either at the time it was reached or at some later time while it was still in effect; and

Three, at the time the defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding.

This needs to be alleged in a charge for [conspiracy] of 500 grams or more, under Title 21 U.S.C. § 841 et seq..

To be with 21 U.S.C. § 846,... Possession with the Intent to Distribute: The crime of possession with the intent to distribute more than 500 grams of cocaine as charged, also has three essential elements, which are:

One, the defendant was in the possession of more than 500 grams of cocaine;

Two, the defendant knew he was in possession of cocaine; and

Three, the defendant intended to distribute some or all of the cocaine to another person.

The necessary element were not presented to the grand jury ratification, there was no weight amounts in the indictment of these various transaction. Thus, Defendant's due process was violated a guarantee of the Fifth Amendment and Sixth Amendment. The indictment that charged Defendant with the sale of one ounce of heroin (25.47 grams), was the lesser included offense, which should have been Defendant's sentencing simpliciter, see Apprendi v. New Jersey, supra, n.21 "We therefore express no view on the

> subject what this Court has already held. See, e.g. Edwards v. United States, 523 U.S. 511, 515 (1998) (opinion of Brewers J., for a unanimous court)(noting that' [o]f course, petitioner statutory and constitutional claims would make a difference if it were possible to

argue, say, that the sentences imposed exceeded the maximum sentence that the statute permit for a cocaine-only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines. [United States Sentencing Guidelines Manual] §5G.1. ."

The Court further held, because the guidelines instruct the judge in a case like this to determine both the amount and kind of controlled substances for which a defendant should be held accountable, and then to impose a sentence that varies depending upon those determination. Id. 708, Statutory and constitutional claims would make a difference if it were possible to argue, say, that sentences imposed exceeded the maximum that the Statutes permits for a cocaine-only conspiracy

Defendant's indictment charge for conspiracy was premised on conspiring to distribute either heroin, cocaine, marijuana, and heroin cutting materials and a general verdict was rendered.

In U.S. v. Rhynes, 196 F.3d. 207 (4th Cir. 1999), Accordingly, as they must be applied here Quicksey and Edwards prohibited the district court from imposing a sentence in excess of the statutory maximum for the least-punished object on which the conspiracy conviction could have been based. In United States v. Dale, 178 F.3d. 429, (6th Cir. 1999),held, that when the jury returns a general verdict to a charge that a conspiratorial agreement covered multiple drugs, the defendant must be sentenced as if he distributed only the carrying the lower penalty.

Defendant's statutory maximum should have calculated at the lesser included; 20 grams but less than 40 grams of heroin or the equivalent amount of other schedule, 1 or 2 opiates. Thus, requiring a offense base level of 18 and Criminal History Category. Therefore, according to the Guidelines 2D1.1 (a)(3)(c)(3) shall be striking. For the role

of leader, organizer,manager or super vision to increase the level of punishment 3B1.1, by two levels, needs to charged in the indictment, see Jones supra; any criminal activity that increases the punishment essential elements should be charged in the [i]ndictment and not for a judge to make a determination.

Furthermore the Court used it's own determination when cal culating Defendant's Criminal History, and erroneously applied two criminal history points for a conviction that was imposed less than 15 years prior to Defendant's commencement of the instant offense. This court failed to use any Sentencing Guidelines authority, Statute, Chapter and Policy Statement promulgated by any commission to increase Defendant's history level by three points. Also the Court made the determination for enhancement purposes using a imposed sentence within ten years of the commencement of the instant offense.et seq. of the instant offense. Violating Defendant's :Due Process of Law," his 5th and 6th Amendment protections, that should have been before a jury of Defendant's peers.

The Pre-Sentence Investigatorive Report (PSI) used no provis ion of the Sentencing Guidelines to calculate Defendant's priors in Case No. 72 CR 853, 76-1280, and 80 CF 5110, In Jones v. United States, 526, U.S. 227, that, with regard to Federal Law, the Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees requiring that any fact other than prior conviction that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. See exhibits

The *Jones* Court, stated, at stake in this case are constit utional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," Amendment 14, and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy an impartial

jury," Amendment 6. Taken together, these rights indisputable entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." United States v. Gaudin, 515 U.S. 506, 510, (1995); Sullivan v. Louisiana, 508 U.S. 275, 278, (1993), and Winship, 397 U.S. @ 364 (" [T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

In the aforementioned Cases no notice of enhancement was filed with the Clerk of the Court, nor the trial court to be used in calculating Defendant's Criminal History Category.

The *Jones* court announced a new principle of constitutional law requiring the quantity of cocaine attributed to defendant under 21 U.S.C. § 841(B)(1)(c), to be considered a substantive element of his drug offense. This Court has held on many occasion that drug quantity remains a sentencing factor.

The Supreme Court has altered the existing law with respect to 21 U.S.C. § 841 (a)(1);(B)(1)(b),(B)(1)(c), and (B). The question among many: Does the principle announced in *Jones* and *Castillo* precludes the infliction of § 841(b) enhanced penalties on a defendant without a grand jury indictment charging the factual predicate for those greater penalties and without a trial jury finding that those facts existed beyond a reasonable doubt. *Castillo v. United States* 68 U.S.LW. 4475 (U.S. June 5, 2000).

Questions of Federal Law in manner that conflicts with the directive of *Jones v. United States* 526 U.S. 227, 119 S.Ct. 1223 (1999), and *Castillo v. United States* 68 U.S.L.W. 4475 (June 5, 2000):

Jones notes that the Due process Clause of the Fifth Amendment and the notice and Jury trial guarantee of the Sixth Amendment require any fact that increases the maximum penalty of a crime to be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Title 21, U.S.C. § 841(b) provides enhanced penalties for persons convicted of controlled substance offenses under 21 U.S.C. § 841 (a), depending on the amount and type of controlled substance involved in the offense. Prior to Jones v. United States, ante. The precedents of the Federal Courts of Appeals held, that, for the purpose of § 841(b), the amount of a controlled substance involved in an offense was not an element of the offense that be charged in an indictment, submitted to a jury, and proven a reason able doubt, but rather was a factor to be determined at sentencing. See Barker v. United States 7 F.3d. 629,634 (7th Cir. 1993);

United States v. Lindia, 84 F.3d. 1154, 1160 (1st. Cir. 1996); United states v.Campuzano, 905 F.2d. 677, 679-80 (2nd. Cir. 1990); United States v.Gibbs, 813 F.2d. 596, 598-600 (rd. Cir. 1987); United States v. Fletcher, 74 F.3d. 49, 53 (4th Cir. 1996); United States v. Bounds, 985 F.2d. 188, 194—95 (5th Cir. 1993); United States v. Buchanan 985 F.2d. 1372, 1377 (8th Cir. 1993); United States v. Sotelo-Rivera, 931 F.2d. 1317, 1319 (9th Cir. 1991); United States v. Poole, 929 F.2d. 1476, 1483 (l0th Cir. 1991); United States v. Cross, 916 F.2d. 622 (11th Cir. 1990); United Stetes v. Lam Kwong-Wah, 966 F.2d. 682, 685 (D.C. Cir. 1992).

The *Jones Court* undermined these precedents. In Jones, this Court held that the federal carjacking Statute, 18 U.S.C. § 2119, established three distinct offenses, each of which must be charged by indictment, submitted to the jury for verdict, and proven be yond a reasonable doubt.

Id., 119 S.Ct. @ 1216. The Court ruled that facts regarding "serious bodily injury" or "death" under the statute are not sentencing factors, but rather elements of the offense. Id. @ 1228. In reaching this conclusion, the court was substantially influenced by constitutional law.

> [U]nder the due process clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Jones, 119 S.Ct. 1224 N.6. (1999).

Jones altered the precedents of the federal Court Of Appeals as to preclude the infliction of the enhanced penalties of 21 U.S.C. § 841 (b) on a defendant without a grand jury indictment charging the factual predicate for those greater penalties and without a trial jury finding that those facts existed beyond a reasonable doubt. It observed only that no other circuits has extended Jones to 21 U.S.C. § 841(b):

> *Castillo* confirmed that the enhanced penalties in 21 U.S.C. § 841 (b) should be treated as element of an offense for which the factual predicated must be charged by indictment, submitted to the jury for a verdict and proven beyond a reasonable doubt.

During the Jury Instruction conference reading, the court failed to issue a jury instruction specifying charges on quantity, and drug type and an amount to be returned by jury. The Court violated Defendant's due process guarantees afforded by the 5th and 6th Amendment, also applying to the 14th Amendment toward the State. This unwarranted determination to enhance Defendant on multiple drugs presented to the jury on Count One of the conspiracy charge to increase Defendant's sentence penalty

is a violation, of Defendant's guarantees afforded through the Constitution.

In *Castillo* supra; The court affirmed its holding in *Jones* observing that treating facts that lead to an increase in the maximum sentence as a sentencing factor would give rise to significant constitutional questions. See Castillo, 2000 WL 712805 @3, citing *Jones* supra @ 1215. In *Castillo* the court considered whether the statutory reference to a "maximum" in 18 U.S.C. § 924(c)(1), stated an element of a firearm offense or simply authorized an enhancement penalty. If the statute created offense elements, then the indictment must identify the firearm type and a jury must find that element proved beyond a reasonable doubt. However, if the statute simply authorized an enhanced penalty, then the matter need not be tried by a jury and may be left for the sentencing judge to decide. Based on the language, structure, context, and other factors that are typically helpful in deter mining a statute's objections, the court held that the use of the word "machine gun" in § 924(c)(1) referred to an element of an offense instead or simply authorizing an enhanced penalty. See Castillo supra, @ 7. Importantly, the court observed;

> [T]o ask a jury, rather than a judge, to decide whether a defendant used and carried a machine gun would rarely complicate a trial or risk un fairness. As a practical matter, in determining whether a defendant used or carried a firearm, the jury ordinarily will be asked to assess the particular weapon at issue as well as the circumstances under which it was allegedly used. Furthermore, inasmuch the prosecution's case under § 924 (c) usually will involve presenting a certain weapon (or weapons) to the jury and arguing that the defendant used or carried that weapon during a crime of violence within the meaning of the Statute, the evidence is unlikely to enable a defendant to respond to both: (1) "I did not use or carry any fire-

> arm," and (2) even if I did, it was a pistol, not a machine gun. "Hence, a rule of Law that makes it difficult to make both claims at the time to the same decision maker (the jury) will not often prejudice a defendant's case.

Castillo 2000 WL 712805 @ 5.

In light of the concerns articulated in Castillo for this reasons, the prior precedents of those courts which held that under § 841(b) the quantity of a controlled substance involved in drug trafficking case is a sentencing factor rather than element of an offense are of no relevance. This court should therefore decide, in light of Castillo and Jones and *Apprendi* whether § 841(b) creates element of an offense to be determined by a jury or sentencing factors to be determined by a judge.

The Jones decision has changed the constitutional landscape regarding factors that enhance a defendant's sentence and imposes a clear rule with respect to any fact, such as the amount of drugs attributable to the defendant, that increases the statutory maximum sentence. Any fact that leads to an increased statutory sentence must be alleged in the indictment and proven beyond a reasonable doubt at trial. Thus, Jones and Apprendi require that before a defendant can be convicted and sentenced under 841 or 846 or other sentences that contain enhancement elements, the amount of drugs must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. The Supreme Court in Apprendi, held in a majority decision that with the exception of prior con victions, any fact that increases a defendant's sentence beyond that provided by the statute as the maximum for the crime of conviction must be proved to the jury beyond a reasonable doubt.

Thus it is a due process violation of the Fifth, and Sixth Amendment in this new millennium changing in constitu-

tional law, for a court to make a determination to enhance Defendant's sentence beyond the statutory requirement, when the essential elements require all essential elements to be placed in the indictment. These element presented to a jury of peers and proven beyond a reasonable doubt. In this action the court didn't give a jury the quantity, amount, weight and purity of any controlled substance to violate Defendant's due process guarantees of the Constitution.

For the foregoing reasons Defendant's charge of conspiring, and to distribute charge, shall be dismissed in light of *Jones* and *Apprendi* or as the Court deems.

Respectfuliy Submitted,

_____

/s/Jonathan Penny

/ #83415-020
Federal Correction Institution
P.O. Box 5000
Pekin, IL 61555-5000

PROOF OF SERVICE / MAILING

The above, and undersigned certify that a true and correct copy of this document was duly mailed to the district court of clerk, to be filed and amended with the Original filed 28 U.S.C. § 2255 pleading. Enclosed is a copy of amended substantive law,due to the Supreme Court's ruling of Apprendi.

Enclosed is (1) one original and (1) copy to the Clerk of the Court to filed and amended.

Furthermore, I have caused to be forwarded on copy to

the United States Attorney's Office.

On this 8th day of August, 2000, I have cause to be placed in Pekin, Illinois, Federal Correction Institution Mail chuck the aforementioned Original and copies to the above mentioned parties.

Respectfully Submitted,

_____

/s/ Jonathon 'Penny

cc.f

The Clerk of The Court
For The Northern District
Of Illinois
The District Court
Chicago, IL 60604

James M. Conway
Assistant U.S. Attorney
219 South Dearborn Street
5th Floor
Chicago, IL 60604

Executed on this 8th day of August, 2000.

IN THE UNITED STATES OF AMERICA
FOR THE NORTHERN DISTRICT OF ILLINOIS

JONATHAN PENNY,	)	
Petitioner,	)	
v.	)	Docket #92-CR-448-1
UNITED STATES	)	
OF AMERICA	)	
Respondent.	)	

MOTION TO VACATE SET ASIDE OR CORRECT A SENTENCE AND SUPPORTING MEMORANDUM OF LAW

COMES NOW Petitioner, Jonathan Penny, by and through undersigned court and respectfully requests this Honorable Court to vacate, set. aside or correct a sentence pursuant to Title 28 § 2255 and states as follows:

JURISDICTION

Title 28 §2255 holds that the court shall vacate and set aside a judgment in a cnmrnal case if the court determines that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights as to render the judgment vulnerable to collateral attack.

VENUE

Petitioner was tried, convicted and sentenced in the Northern District of Illinois, the Honorable Wayne R. Anderson, presiding. Therefore the venue is appropriate.

After a brief statement of the case and statement of the facts, Petitioner will present two issues to be considered by

this court:

1. WHETHER PETITIONER RECEIVED INEFFECTIVE ASSISTANCE AT TRIAL AND ON APPEAL

2. WHETHER THE GOVERNMENT WITHHELD EVIDENCE REQUIRING A GARCIA HEARING.

STATEMENT OF THE CASE

On April 4, 1989, District Court Judge J. Grady issued an Order, finding probable cause for a civil forfeiture action under 21 U.S.C. § 881(a) (4) (6) and (7). Buildings, automobiles, bank accounts and personal items were seized. *U.S. v. All Assets of Westside Bldg. Corp*

Petitioner retained Chester Slaughter to litigate the in rem forfeiture. Although the probable cause affidavit named the Petitioner, his wife, Clara Penny, and other family members as participating co-conspirators, Slaughter advised the Pennys that their best interests would be served by representing Clara Penny in her capacity of president of West Side Building Corporation. A default judgment was entered against Petitioner.

A criminal Indictment was filed June 9, 1992, charging Petitioner with violations of 21 U.S.C. §841 (a) (1) and 846, conspiracy with intent to distribute narcotics and distribution. The Indictment alleged the same information as the forfeiture case.

On September 10, 1993, Petitioner was found guilty of the two charges. Petitioner was represented initially by Chester Slaughter during the forfeiture proceeding. Upon the government's Motion to Disqualify, Freddrena Lyle, Slaughter's law partner, replaced him as counsel of record and became counsel during the criminal proceedings as well.

A Presentence Investigation Report, prepared by U.S. Probation Officer, Andrea Schwallie, was submitted to the Honorable Wayne R. Anderson on October 29, 1993. The factual basis of the Report was used by the Court during sentencing. Upon advice of counsel, Petitioner declined to be interviewed for the Report.

Petitioner was sentenced to 25 years imprisonment to be followed by Supervised Release for life.

An Appeal filed by Barry Spevack, Esq., Chicago, Illinois, was denied.

STATEMENT OF THE FACTS

The Penny forfeiture action was initiated in 1989, a period of scrutiny and re-evaluation of in rem forfeiture and double jeopardy considerations.

Petitioner's initial counsel, Chester Slaughter, an experienced trial attorney, was hired to defend the forfeiture claim. Clara Penny was named as sole claimant and in her capacity as President of West Side Building Corporation.

On January 10, 1991, the government moved to disqualify Slaughter. The Motion was sealed. In October, 1998, Petitioner became aware that Slaughter had been under investigation for narcotics trafficking.

Freddrena Lyle, Slaughter's law partner, noticed her appearance for the *in rem* forfeiture on January 13, 1992. She was also retained as counsel for the criminal proceedings.

The offices of Slaughter and Associates, by filing in the name of Clara Penny, effectively foreclosed any double jeopardy claim on the part of Petitioner. Despite the restriction of Title 21 § 884 precluding "the exploitation of such testimony or other information, may be used against

the witness in a criminal case." Johnathan Penny was not named as claimant. The same evidence used in the forfeiture case was duplicated in the criminal case.

Petitioner alleges a conflict of interest. Lyle and Slaughter were partners and associates. In an effort to protect Slaughter, Lyle subourned the court and criminal proceedings, breaching her first duty of loyalty to her client and protecting the interests of the firm.

1. WHETHER PETITIONER WAS DENIED HIS CONSTITUTIONALLY RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

The right to counsel guaranteed by the Sixth Amendment in criminal cases assures that a defendant will be given the effective assistance of counsel. Effectiveness of counsel is measured against a standard of reasonable competence. Strickland v. Washington 466 U.S. 668, 104 SCt 2052, 80 LEd2d 674 (1984). Representation is ineffective when counsel's performance has "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' To be constitutionally significant, a deficiency in counsel's performance must have a prejudicial effect on the defense of the case.

The effective performance of counsel requires meaningful compliance with the duty of loyalty and the duty to avoid conflicts of interest, a breach of these basic duties can lead to ineffective representation. When counsel for a defendant in a criminal case has an actual conflict of interest when representing the defendant and the conflict adversely affects counsel's performance in the defense of the defendant, prejudice is presumed and a new trial ordered. *Cuyler v. Sullivan* 466 US 335, 64 LEd2d 233, 100 SCt 1708, (1980). In these circumstances, no prejudice need be

shown, the conflict of interest is presumed harmful. Legal representation, affected by actual conflict of interest is never considered harmless error. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. US. 315 US 60, 86 LEd2d 680, 62 SCt 457 (1942).

Cuyler requires the defendant to show that the attorney actively represented conflicting interests. Successive law partners handling the same case, one of whom was targeted in a narcotics investigation, created such a conflict. It is well settled that a "criminal defendant is entitled to counsel whose undivided loyalties lie with the client." *U.S. v. Ellison* 789 F2d 1102 (Circuit 1986). Although the Motion to Disqualify Slaughter is sealed, an Order granting the Motion was in evidence.

The Court of Appeals in Docket #96-3854, *U.S. v. 3136 S. Dobson Street*, Chicago, Illinois and Rodney Anderson supports Petitioner's assertion that his original attorney, Slaughter, had interests of his own to protect. The Seventh Circuit affirms Slaughter's trafficking investigation stating, "the district court had notified Anderson that his attorney was the potential target of a narcotics trafficking investigation." Slaughter "was being investigated for offering to sell fifty kilograms of cocaine." The district court also entertained the claim that "Slaughter broke the law in notarizing the Anderson claimants' purported signatures." Petitioner was without the knowledge of the conflict Rodney Anderson waived. Petitioner knew only that upon the sealed Motion by the Government, Slaughter was removed from the forfeiture case and Freddrena Lyle, Slaughter's law partner, became counsel of record during the forfeiture and criminal phases of the proceedings.

Petitioner's trial began August 30, 1993. On September 9, 1993, Petitioner, after eleven days of trial, spoke with

Lyle, being desirous of testifying on his own behalf (Trial Tr., Vol. 7, P. 890). After a recess, Petitioner was convinced by counsel to forego testifying. Lyle presented no evidence on behalf of Petitioner, "The evidence of counsel's struggle to serve two masters (could not) be seriously doubted." *Glasser* Supra.

Petitioner now asserts Lyle failed to raise any defense or present evidence that may have implicated Slaughter or furthered any on-going investigation of him.

Petitioner did not waive any conflict. He was not apprised of the contents off the sealed Motion for Disqualification, nor did he know the continuation of representation by the Slaughter-Lyle Law Firm created the conflict of interest violations of Cuyler and the Sixth Amendment. Lyle's attempt to shield Slaughter from the consequences of his criminal acts, and her abandonment of Petitioner, requires reversal.

On Appeal, Barry Spevack, newly retained Counsel, failed to argue the Sixth Amendment violation. Although the Rodney Anderson Waiver of Conflict was in the public record as early as October, 1991. The Appeal was filed January 23, 1995.

2. WHETHER THE GOVERNMENT WITHHELD EVIDENCE REQUIRING A GARCIA HEARING.

The Fifth Circuit in *U.S. v. Garcia*, 517 F2d 272 (1975) said that "defendants enjoy the right to knowingly and intelligently waive any disqualification noted by the district court." The conclusion of the Garcia court reflects the limitations established by the Supreme Court in *Johnson v. Zerbst* 304 US 458, 82 LEd2d 1461, 58 SCt 1019 (1938), and *Brady v. U.S.* 397 US 742, 25 LEd2d 747, 90 SCt 1463 (1970) that a waiver of a constitutional right must be an intelligent relinquishment or abandonment of

a known right, that it must be made with the awareness of the circumstances, and the likely consequences of the waiver.

The *Garcia* court held, "We instruct the district court to follow a procedure akin to that promulgated in F. Crim., P. 11, whereby the defendant's voluntariness and knowledge of the guilty plea will be manifest on the face of the record. As in Rule 11 Procedures, the district court should address the defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. He must voluntarily waive his Sixth Amendment right. It is, of course, vital that the waiver be established by clear, unequivocal, and unambiguous language.

Although the government was aware of the conflict of interest, using the identical information in the civil and criminal cases, no *Garcia* hearing was held. The Motion to Disqualify was sealed and Slaughter's closest associate, Lyle, became counsel of record. The government's investigation of Slaughter deprived Petitioner of his Sixth Amendment Right.

The non-disclosure of this vital information to the Petitioner violated his right to conflict-free representation. In *U.S. v. Hubbard*, 22 F3d at 1418-19 (another cite incorporating a Rodney Anderson claim), the district court advised Rodney Anderson "(your attorney) might sell you out to help himself."

The Seventh Circuit in *U.S. v. Fish* 34 F3d 488 (1994) held that a trial court must adequately inquire into any conflict of interest. Although it is unclear if the Court in the criminal case was aware of the conflict, it was the government's duty to disclose the *Brady* material. The government was silent.

The "lapse in representation contrary to the defendant's interest," *Stoia v U.S.*, 22 F3d at 771, coupled with the Brady violation, denied Petitioner his constitutionally guaranteed right to counsel, free of conflicting interests.

WHEREFORE, in light of the foregoing argument in support, Petitioner requests this Honorable Court to vacate and set aside this sentence and grant any further relief the court shall deem necessary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. Mail to James Conway, Assistant U.S. Attorney, 219 5. Dearborn Street, Chicago, Illinois, 60604, this date: April 6, 1999.

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